

HHS Proposes New Authority for Secretary to Overturn or Remand Departmental Appeals Board Decisions

On December 28, 2007, the U.S. Department of Health and Human Services (“HHS”) issued a proposed rule that would grant the Secretary of HHS new authority to overturn or remand certain decisions of the Departmental Appeals Board (“DAB”), the independent body within HHS responsible for resolving disputes between HHS and certain aggrieved parties.



For certain types of disputes, the initial appeal is heard by administrative law judges (“ALJs”) who are part of the DAB. Those decisions may then be appealed to the DAB’s Appellate Division, (the “Board”) which also has original jurisdiction in other instances. An appellant that is dissatisfied with a Board decision may appeal to federal court.

The rule proposes to reverse long-standing law and allow the Secretary—on his or her own initiative—to overturn or remand Board decisions, including: decisions on grants under Medicaid, TANF, and Head Start; exclusions from federal health care programs; civil monetary penalties imposed upon Medicare Advantage Organizations or Prescription Drug Plans under Medicare Part C or Part D, respectively, as well as those imposed for violation of certain Fraud and Abuse restrictions; and determinations of whether various providers and suppliers meet the conditions of participation in Medicare or Medicaid.

The proposed rule indicates that upon remand, the Secretary would “instruct the [Board] in the proper application of statutes, regulations, or interpretive policy.” The Secretary could also intervene when the Board declines to review an initial ALJ decision, in which case the Secretary could issue his or her own decision without the Board’s involvement.

In all instances, the Board and DAB ALJs would be newly required to follow HHS guidance and policy “to the extent not inconsistent with statute or regulation.” There are no provisions to allow any party to request or object to the Secretary’s review—all reviews would be at the Secretary’s discretion. Except for the requirement that the Secretary initiate review within 30 days of the Board’s decision in a given case, the proposed rule does not include clear deadlines, procedural provisions, or evidentiary requirements for Secretarial review. Although the Secretary’s final decision could be appealed to federal court, the proposed rule could introduce into the administrative appeals process an additional layer of complexity that could alter or delay the resolution of matters under HHS’s review.

HHS has further proposed to make these changes effective for matters currently “under Board review” for which a decision has not been issued. Consequently, if this proposed rule were to go into effect before the Board renders a decision, but after an appellant has presented its arguments to the Board, a decision—by the Board or the Secretary—could theoretically be made under standards differing from those that applied when the arguments were presented to the Board.

Comments on this proposed rule are due to HHS by 5:00 p.m. on January 28, 2008.

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